

Henry E. Heater (State Bar #99007)
Linda B. Reich (State Bar #87619)
Endeman, Lincoln, Turek & Heater LLP
600 "B" Street, Suite 2400
San Diego, California 92101-4508
(619) 544-0123
Fax (619) 544-9110

John G. Barisone (State Bar #087831)
City Attorney, City of Capitola
Atchison, Barisone, Condotti & Kovacevich
333 Church Street
Santa Cruz, California 95060-3811
(831) 423-8383
Fax (831) 423-9401

Attorneys For Defendant
City of Capitola

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

SURF AND SAND, LLC, a
California Limited Liability
Company,

Plaintiff,

CITY OF CAPITOLA, and DOES 1
through 10, Inclusive

Defendants.

CASE NO. C07 05043

Judge: Richard Seeborg

E-FILING

Date: May 21, 2008

Time: 9:30 a.m.

Ctrm: 3, 5th Floor

ACTION FILED: 10/01/07

**DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION
TO MOTION TO DISMISS FIRST AMENDED COMPLAINT**

TABLE OF CONTENTS

	<u>Pages</u>
INTRODUCTION	1
ARGUMENT	1
I PARKOWNER FAILS TO STATE ANY TAKINGS CLAIM - PUBLIC OR PRIVATE	1
II PARKOWNER CANNOT STATE A PRIVATE TAKING OR SUBSTANTIVE DUE PROCESS CLAIM BECAUSE THE PCNO IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT PURPOSE	2
III PARKOWNER FAILS TO STATE AN EQUAL PROTECTION CLAIM BECAUSE THE PCNO IS FACIALLY NEUTRAL	3
CONCLUSION	4

TABLE OF AUTHORITIES

CASES

Pages

<i>Garnau v. City of Seattle</i> 147 F.3d 802 (9 th Cir.1998)	2
---	---

STATUTES

Cal. Gov't Code § 66427.5	2, 3
---------------------------------	------

INTRODUCTION

Defendant's ("Parkowner") Opposition is rife with contradiction. Parkowner appears to insist that it has a bona fide intent to convert its Park to resident ownership. At the same time however, it has informed both the Park residents and defendant ("City") that it intends to close the park instead.

Moreover, in the midst of a deepening real estate recession, Parkowner complains that its residents do not want to buy their spaces. Parkowner calls this a resident "veto"; however, given that the residents are the only likely potential buyers, Parkowner essentially is claiming that the "market" will veto its subdivision. Certainly a professed intent to convert the Park, during a recession, and with no willing buyers, does not appear bona fide.

Parkowner's facial private and public takings claim fail for the simple reason there was no taking caused by the mere enactment of the PCONO. Indeed, the PCONO's economic impact on Parkowner, if any, is unknowable until Parkowner goes through the conversion process.

Parkowner's private taking and substantive due process claims fail because City rationally could have believed that if most Park residents were unwilling to buy their spaces, any Park conversion might be unsuccessful.

Parkowner's equal protection claim fails because on its face the ordinance does not treat similarly situated mobilehome parkowners differently.

ARGUMENT

I

PARKOWNER FAILS TO STATE ANY TAKINGS CLAIM - PUBLIC OR PRIVATE

The *sine qua non* of any facial taking claim is economic impact. Here Parkowner must show that the mere enactment of the PCONO caused such "severe" diminution in

E:\1280.010\Pleadings\0012 Defe Reply to Plts Oppos to Mtn to Dismiss LAC.wpd

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION
TO MOTION TO DISMISS FIRST AMENDED COMPLAINT

C07 05043 RS

1 value of its park that it is “commercially impracticable for [it] to continue operating [its
2 park].” *Garnau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998). Parkowner makes
3 no such allegation. Nor has it applied for a rent increase under the RCO on the grounds it
4 is not receiving a fair return on its Park.

5 Moreover, the Court can see that on its face, the PCONO has no economic impact
6 on Parkowner until such time as Parkowner attempts to convert its Park.

7 II

8 **PARKOWNER CANNOT STATE A PRIVATE TAKING 9 OR SUBSTANTIVE DUE PROCESS CLAIM BECAUSE 10 THE PCONO IS RATIONALLY RELATED 11 TO A LEGITIMATE GOVERNMENT PURPOSE**

12 Parkowner complains that resident interest in buying its park is irrelevant to the
13 issue of a bona fide conversion. Parkowner forgets that it was the State - not the City -
14 that initially imposed the requirement of a resident survey (Cal. Gov’t Code § 66427.5(d))
15 for the very purpose of determining whether a proposed conversion was bona fide.¹ All
16 City’s Ordinance does is procedurally flesh out how the survey is to be used. Parkowner
17 never sued the State to challenge the validity of section 66427.5.(d).

18 Parkowner apparently is so accustomed to having an adversarial relationship with
19 its Residents, that it also forgets that these very Residents are its potential customers in
20 any conversion. If Parkowner does not have any customers for its conversion, it certainly
21 is not City’s fault. Moreover, a lack of sufficient customers willing to buy spaces
22 certainly is some indication that a conversion might not be successful. Where a
23 parkowner purports to sell his park to its residents, knowing they will not buy it and that
24 he cannot successfully convert it, a reasonable inference is that he has some intent other

25 ¹Given the State intended the survey to help determine whether a proposed conversion
26 was bona fide, it is difficult to understand what information it expected to collect other
27 than the park residents’ interest in and financial ability to buy the spaces in their Park.

1317280.010\Plendings\0012 Defs Reply to Plis Oppos to Mtn to Dismiss LAC.wpd

1 than going through the conversion process.

2 **III**

3 **PARKOWNER FAILS TO STATE**
 4 **AN EQUAL PROTECTION CLAIM BECAUSE**
 5 **THE PCONO IS FACIALLY NEUTRAL**

6 On its face the PCONO does not purport to treat similarly situated property owners
 7 differently. Under the circumstances Parkowner's equal protection claim does not
 8 challenge the PCONO itself.

9 Parkowner instead claims that City did not enact the PCONO in response to earlier
 10 conversion of a resident-owned park, but only passed it in response to Parkowner's
 11 expressed intent to convert its park. Parkowner's argument, however, misses the point.

12 First, any time a City enacts a new land use restriction, affected property owners
 13 will be able to claim that similarly situated pre-restriction property owners did not face
 14 the same restriction. If such a claim evidences an equal protection violation, no
 15 governmental entity could promulgate new land use regulations.

16 Second, Parkowner fails to negate any rational reason why the PCONO was not
 17 adopted earlier. As City noted in its motion, the previous subdivision was of a park that
 18 was owned by a resident-owned corporation. As a resident-owned park, it was exempt
 19 from rent control and the City certainly had a rational basis for therefore concluding that
 20 it was not a sham conversion to avoid rent control.

21 Parkowner's proposed conversion was the first private conversion proposed after
 22 the amendment of Government Code Section 66427.5. Because Section 66427.5 was
 23 silent as to the survey's contents, or any procedures for its use, the City needed to adopt a
 24 local ordinance to fill these gaps.

25 ///

26 ///

27 E:\1280.010\Pleadings\0012 Defs Reply to Plis Oppos to Mtn to Dismiss 1AC.wpd

28 **DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION
 TO MOTION TO DISMISS FIRST AMENDED COMPLAINT**

C07 05043 RS

CONCLUSION

For the foregoing reasons, the Court should dismiss Parkowner's First Amended Complaint.

Respectfully Submitted,

Dated: April 28, 2008

Henry E. Heater
Linda B. Reich
Endeman, Lincoln, Turek & Heater LLP

John G. Barisone
City Attorney, City of Capitola
Atchison, Barisone, Condotti & Kovacevich

By: Linda Reich for
Henry E. Heater
Attorneys for Defendant City of
Capitola

\\1280.010\ pleadings\0012 Defs Reply to Plts Oppos to Mtn to Dismiss 1AC.wpd

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION
TO MOTION TO DISMISS FIRST AMENDED COMPLAINT

C07 05043 RS